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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

**THAN ZAW, INDIVIDUALLY
AND ON BEHALF OF ALL
OTHERS SIMILARLY
SITUATED,**

Plaintiff,

v.

**NELNET BUSINESS
SOLUTIONS INC.; NELNET,
INC.; and NELNET
SERVICING, LLC; and DOES 1-
100,**

Defendant.

**LAW OFFICES OF TODD M.
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Case No.: C 13-05788 RS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT**

DATE: November 13, 2014
TIME: 1:30 p.m.
COURTROOM: 3

HON. RICHARD SEEBORG

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I.INTRODUCTION

Plaintiff THAN ZAW (“Plaintiff”) submits this Memorandum in Support of Final Approval of the Parties’ Class Action Settlement. As discussed in Plaintiff’s Motion for Preliminary Approval, the Parties’ Settlement Agreement resolves all California Penal Code § 632 claims in this matter against Defendant NELNET SERVICING, LLC (“Defendant”) that occurred between December 18, 2011 and August 4, 2014. [See ECF No. 22, Order Certifying Provisional Settlement Class; Preliminarily Approving Class Action Settlement and Providing For Notice to the Settlement Class (“Preliminary Approval Order”)].

Plaintiff brought this action on behalf of himself and all others similarly situated alleging that Defendant recorded Plaintiff and the putative class members without their knowledge and/or consent in violation of California Penal Code § 632. [Plaintiff’s Fourth Amended Complaint, ECF No. 41 (“4AC”), ¶ 1]. As described in the Parties’ Joint Motion for Preliminary Approval of Class Action Settlement, Defendant shall establish a settlement fund in the total amount of \$1,188,110.00 to resolve the claims of the class. [See ¶ 3 of the Parties’ Settlement Agreement and Released attached as Exhibit 4 to the Parties’ Motion for Preliminary Approval]. Since 2010, the Parties have engaged in extensive discovery, depositions and Motion practice. As a result of this litigation, the Parties have fully established the applicable claims and defenses necessary to fairly, reasonably, and adequately evaluate the class claims that Plaintiff sought to represent.

With this Motion, Plaintiff now seeks final approval of the Parties’ Class Action Settlement because no facts have arisen that would call into question the Class Action Settlement being fair, adequate and reasonable. [ECF No. 66]. In fact, not a single consumer has objected to the settlement and only one consumer has requested exclusion. [Kazerounian Decl., ¶¶ 18-19; and, Zaw Decl., ¶¶ 6-7]. As discussed in detail below, the proposed Settlement satisfies all criteria for

1 settlement approval under Ninth Circuit authority.

2 **II. PROCEDURAL BACKGROUND**

3 The Parties were only able to reach this substantial settlement with the
4 assistance the Honorable Edward A. Infante (Ret.) after more than four years of
5 litigation. For the purpose of clarity, Plaintiff describes this litigation process
6 below.

7 **A. PLAINTIFF'S ALLEGATIONS**

8 On December 30, 2010, Zaw initiated this action against Nelnet in the
9 Superior Court of Contra Costa. [See Declaration of Todd Friedman filed
10 concurrently with Plaintiff's Motion for Attorneys ("Friedman Decl."), ¶ 20].
11 Thereafter, Nelnet lodged a demurrer in response to Zaw's Complaint. [Id. at ¶
12 21]. After amending Zaw's Complaint to cure the alleged deficiencies, Nelnet
13 lodged yet another demurrer to Zaw's First Amended Complaint. [Id. at ¶ 22].
14 After further amendment and another demurrer, Plaintiff lodged a Motion for
15 Leave to File a Third Amended Complaint. [Id. at ¶ 23]. During this time, the
16 Parties engaged in extensive discovery required to prove each of Zaw's
17 allegations. [Id. at ¶ 24]. Thereafter, Nelnet removed this matter to this Court on
18 December 13, 2013. [ECF No. 1]. On January 29, 2014, the Parties settled and
19 dismissed Zaw's individual claims pursuant to the Rosenthal Fair Debt Collection
20 Practices Act, Cal. Civ. Code § 1788, et seq. which left only Plaintiff's class
21 claims remaining. [ECF No. 15].

22 Only after additional discovery and settlement discussions between counsel,
23 the Parties determined that mediation would assist the Parties in resolving this
24 matter. [Kazerounian Decl., ¶ 26]. As such, the Parties utilized the Honorable
25 Edward A. Infante (Ret.) of JAMS. [Id.]. As a result of an all-day mediation
26 session with Judge Infante on October 16, 2013, the Parties were able to reach an
27 agreement on the amount of the settlement. [Id.]. The Parties then continued
28 negotiations about the many details of the settlement in good faith for several

1 months and were eventually able to agree on the remaining terms of the
2 settlement. [*Id.*].

3 On June 10, 2014, the Parties filed a Joint Motion for Preliminary Approval
4 of the current Class Action Settlement. [ECF No. 16]. Said Motion was granted
5 on August 4, 2014. Currently pending before this Court are Plaintiff's Motion for
6 Final Approval; and, Plaintiff's request for attorneys' fees, costs, and an incentive
7 award for Plaintiff.

8 **B. DISCOVERY**

9 Following the Motion practice discussed above, the Parties continued to
10 vigorously litigate this matter during the discovery process. [Kazerounian Decl., ¶
11 7; and, Swigart Decl., ¶ 7]. Plaintiff propounded numerous discovery requests
12 including Requests for Admissions; Requests for Production of Documents; and,
13 Special Interrogatories. [*Id.*]. In addition, Plaintiff was also required to respond to
14 Defendant's discovery requests as well as review Defendant's responses to
15 Plaintiff's discovery requests. [*Id.*]. Following review of Defendant's responses,
16 Plaintiff's counsel was forced to meet and confer with Defendant on four separate
17 occasions in order to obtain adequate responses. [*Id.*]. While reviewing all the
18 information obtained in discovery, Plaintiff was required to review and analyze
19 documents and information as well as research additional defenses proposed by
20 Defendant in Defendant's discovery responses. [*Id.*].

21 **C. MEDIATION AND SETTLEMENT NEGOTIATIONS**

22 Prior to attending formal mediation sessions with Judge Infante, the Parties
23 engaged in informal settlement discussions to further establish and justify the
24 Parties' respective positions. [Kazerounian Decl., ¶ 5; and, Swigart Decl., ¶ 5].
25 Said discussions included examination of the legal landscape regarding unlawful
26 recording class actions and the settlements reached in those cases. [*Id.*]. In
27 addition, the Parties also discussed the policies and procedures instituted by
28 Defendant in order to avoid such violations. [*Id.*]. During the full-day mediation,

1 the Parties further discussed the applicable claims and defenses but ultimately
 2 reached a framework for the settlement terms on a class-wide basis. [Kazerounian
 3 Decl., ¶ 6; and, Swigart Decl., ¶ 6]. Following mediation, the Parties continued
 4 negotiating in good faith and ultimately agreed on the preliminarily approved
 5 settlement. [Kazerounian Decl., ¶ 7; and, Swigart Decl., ¶ 7]. Only after the
 6 Parties agreed on the material terms of the settlement did the Parties discuss
 7 payment of attorneys' fees, costs and Plaintiff's incentive award. [*Id.*].

8 **PRELIMINARY APPROVAL AND CONDITIONAL CERTIFICATION**

9 On August 4, 2014, this Court preliminarily approved the Parties' settlement
 10 agreement. [ECF No. 22]. Therein the following settlement class was
 11 provisionally certified:

12 All persons within the State of California, who, on or
 13 after December 18, 2011 through the date of preliminary
 14 approval, received a telephone call from Defendant that
 15 was recorded and/or monitored by Defendant.

16 *See* Preliminary Approval Order, ¶ 3.

17 As required in the preliminary approval analysis, this Court preliminarily
 18 determined that the settlement did not result from fraud, overreaching, or collusion,
 19 but instead resulted from serious, informed, non-collusive negotiations. [ECF No.
 20 22]. Following Preliminary Approval of the settlement, the Parties' and the claims
 21 administrator, the Garden City Group, Inc. ("GCG") have adequately performed
 22 their obligations pursuant to the Settlement Agreement. [Kazerounian Decl., ¶ 13;
 23 and, Swigart Decl., ¶ 13].

24 **D. CLASS NOTICE DISSEMINATION**

25 The Parties administered the notice process through the claims administrator,
 26 GCG. [Preliminary Approval Order, ¶ 7]. In accordance with the Settlement
 27 Agreement and this Court's Preliminary Approval Order, GCG provided direct
 28 mail notice; e-mail notice; and, internet notice. [*Id.* at ¶¶ 7(a)-7(b)]. The Class
 Notice provided detailed information regarding (a) class members' rights,

including the manner in which objections and exclusions could be lodged; (b) the case's nature, history and progress; (c) the proposed settlement and reason for the settlement; (d) the settlement's benefits; (e) Class Counsel's requested fees and costs; (f) the Fairness Hearing's date, time and location; and, (g) Class Counsel's contact information. The estimated cost of notice is \$77,519.27. [Kazerounian Decl., ¶ 10(a); and, Swigart Decl., ¶ 10(a)].

E. RESPONSE TO CLASS NOTICE

A notable number of consumers contacted GCG and class counsel to discuss the Class Notice, their options and the case status. Out of all the class members that received notice, not a single consumer objected to the settlement and only one consumer requested exclusion. [Kazerounian Decl., ¶¶ 18-19]. As such, Class Counsel believes that each of the 1,452 Class Members that timely submitted a claim form will receive \$548.94. [Kazerounian Decl., ¶ 10(a); and, Swigart Decl., ¶ 10(a)]. Class Counsel arrived at this number by subtracting notice costs;¹ Plaintiff's attorneys' fees and costs;² and, Plaintiff's requested incentive award of \$1,500 from the \$1,188,110.00 Settlement Fund. [*Id.*].

III. FINAL APPROVAL IS WARRANTED

A. THE CLASS ACTION SETTLEMENT APPROVAL PROCESS

Federal Courts strongly favor and encourage settlements, particularly in class actions and other complex matters where the inherent costs, delays and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiff v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting that "strong judicial policy...favors settlements, particularly where complex class action litigation is concerned"); 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (4th Ed. 2002) (gathering cases). The

¹ GCG informed Plaintiff that the total notice costs for this matter are \$53,758.73; however, GCG expects these costs to increase to \$77,519.27 to complete administration.

² For this calculation, Plaintiff used the full amount demanded, \$297,027 in attorneys' fees and \$15,000 in costs.

1 traditional means for handling claims like those at issue here – individual litigation
 2 – would require a massive expenditure of public and private resources and, given
 3 the relatively small value of the claims of the proposed individual class members,
 4 would be impractical. Thus, the proposed Settlement is the best vehicle for Class
 5 Members to receive the relief to which they are entitled in a prompt and efficient
 6 manner.

7 **B. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE.**

8 Before granting final approval of a class action settlement, a reviewing court
 9 must first find the settlement “is fair, reasonable, and adequate.” Fed. R. Civ. P.
 10 23(e)(1)(A). In evaluating whether a class settlement is “fair, adequate and
 11 reasonable,” courts generally refer to eight criteria, with differing degrees of
 12 emphasis: (1) the likelihood of success by Plaintiff; (2) the amount of discovery or
 13 evidence; (3) the settlement terms and conditions; (4) recommendation and
 14 experience of counsel; (5) future expense and likely duration of litigation; (6)
 15 recommendation of neutral parties, if any; (7) number of objectors and nature of
 16 objections; and, (8) the presence of good faith and the absence of collusion. *See* 2
 17 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (“Newberg”) §
 18 11.43 “General Criteria for Settlement Approval” (3d ed. 1992). This list is

19 not exhaustive, nor will each factor be relevant in every case...The
 20 relative degree of importance to be attached to any particular factor
 21 will depend upon, and be dictated by, the nature of the claim(s)
 22 advanced, the type(s) of relief sought, and the unique facts and
 23 circumstances presented by each individual case.

24 *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982).

25 “A settlement following sufficient discovery and genuine arms-length
 26 negotiation is presumed fair.” *Knight v. Red Door Salons, Inc.*, 2009 WL 248367,
 27 at *4 (N.D. Cal. 2009); *Garner v. State Farm Mut. Ins.*, 2010 WL 1687832, at *13
 28 (N.D. Cal. 2010) (“Where a settlement is the product of arms-length negotiations
 conducted by capable and experienced counsel, the court begins its analysis with a
 presumption that the settlement is fair and reasonable.”). This is because “[t]he

1 extent of the discovery conducted to date and the stage of the litigation are both
 2 indicators of counsel's familiarity with the case and of Plaintiff having enough
 3 information to make informed decisions." *Knight*, 2009 WL 248367, at *4.

4 In the end, "[s]ettlement is the offspring of compromise; the question we
 5 address is not whether the final product could be prettier, smarter or snazzier, but
 6 whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*,
 7 150 F.3d 1011, 1027 (9th Cir. 1998); *see also Pelletz v. Weyerhaeuser Co.*, 255
 8 F.R.D. 537, 544 (W.D. Wash 2009) (same). Here, the record before the Court
 9 demonstrates that the settlement agreement satisfies the Ninth Circuit's standard
 10 and that final approval is warranted. Thus, the Parties request this Court grant the
 11 Parties' Motion for Final Approval.

12 **1. The Strength of Plaintiff's Case and the Risks, Expenses, Complexity**
 13 **and Likely Duration of Further Litigation**

14 Plaintiff continues to believe that Plaintiff's claims against Defendant have
 15 merit and that Plaintiff could make a compelling case if Plaintiff's claims were
 16 tried. If Plaintiff was to prevail, Defendant could face substantial statutory
 17 penalties. Nevertheless, it is apparent that Plaintiff and the Class would face a
 18 number of challenges if the litigation were to continue.

19 ***a. Challenges to the claims on their merits***

20 In the Parties' Preliminary Approval Motion, Defendant identified a number
 21 of potential issues with proceeding on the merits. While Plaintiff disputes the
 22 validity of said assertions, Defendant assert that Plaintiff, and the Class Members,
 23 had no reasonable expectation of privacy because Defendant asserts that each
 24 consumer is informed that Defendant records telephonic communications by an
 25 automated message. [Preliminary Approval Motion, 3:1-12]. Thus, a consumer
 26 that continued speaking after receipt of the warning would have impliedly
 27 consented to said recording.³ [*Id.*]. Based upon these contentions, Defendant

28 ³ *See, e.g., Torres v. Nutrisystems*, 289 F.R.D. 587 (C.D. Cal. 2013).

denies any and all liability related to Plaintiff's Complaint. [*Id.* at 5:9-12]. While Plaintiff believes that Plaintiff would over come these issues, the risk to the class is substantial. To reject this settlement and proceed with litigation would be highly detrimental to the class; thus, Plaintiff believes it is in the best interest of the class to accept this substantial monetary benefit and has acted accordingly by accepting said settlement.

b. *The risk of maintaining class action status throughout trial.*

The benefits of settlement and a plaintiff's chances of success are typically evaluated together. *See, e.g. Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 488 (E.D. Cal. 2010) ("An important consideration in judging the reasonableness of a settlement is the strength of the plaintiff's case on the merits balanced against the amount offered in the settlement."). Through discovery and confirmatory discovery, Plaintiff believes that Plaintiff obtained sufficient information to establish that Plaintiff's class satisfies the requirements of Fed. R. Civ. P. 23; however, Defendant has focused on the issues addressed above to argue that Plaintiff and the Class Members face numerous risks in moving forward and that class treatment of this matter is inappropriate. Should this Court decline to certify Plaintiff's case as a class action, the Class Members will be forced to retain their own counsel and proceed on the basis of individual claims only.

In addition, there is a substantial risk of losing inherent in any jury trial. Even if Plaintiff prevailed at trial, Defendant would almost certainly appeal, threatening a reversal of any favorable outcome. *See Fulford v. Logitech, Inc.*, 2010 U.S. Dist. LEXIS 29042, at *8 (N.D. Cal. 2010) ("[L]iability and damages issues – and the outcome of any appeals that would likely follow if the Class were successful at trial – present substantial risks and delays for Class Member recovery.").

Under the Settlement Agreement, the Class Members may avoid each of the risks described herein and receive substantial monetary benefits. "[T]his settlement...guarantees a recovery that is not only substantial, but also certain and

1 immediate, eliminating the risk that class members would be left without any
 2 recovery...at all.” *Fulford*, 2010 U.S. Dist. LEXIS 29042, at *8. Thus, Plaintiff
 3 contends that the substantial risk weighs in favor of granting final approval of this
 4 matter.

5 **2. The Amount Offered in Settlement**

6 The Settlement requires Defendant to pay \$1.188,110.00 into a settlement
 7 fund out of which eligible Class Members will receive their *pro rata* share of cash
 8 payments. No amount of this fund will revert back to Defendant. Given the
 9 potential issues described above, this settlement represents an outstanding result
 10 for Class Members, particularly because the Penal Code damages are purely
 11 statutory in that Class Members have not suffered any out-of-pocket losses or
 12 other economic harm.

13 As discussed above, Class Counsel estimates that each Class Member will
 14 receive \$548.96. [Kazerounian Decl., ¶ 10(a); and, Swigart Decl., ¶ 10(a)]. Class
 15 Counsel arrived at this number after deducting notice costs as well as Plaintiff’s
 16 attorneys’ fees and costs from the settlement fund.

17 **3. The Extent of Discovery Completed**

18 The Settlement was reached only after Class Counsel’s thorough investigation
 19 and analysis of the factual and legal issues involved. As detailed above, Class
 20 Counsel spent significant time thoroughly investigating the factual and legal claims
 21 involved in this Action, both prior to filing this Action and during discovery.
 22 [[Kazerounian Decl., ¶ 6; and, Swigart Decl., ¶ 6]. In addition, Defendant also
 23 provided Plaintiff with informal discovery as well as responded to confirmatory
 24 discovery to confirm that the settlement was fair, reasonable and adequate.
 25 [[Kazerounian Decl., ¶ 7; and, Swigart Decl., ¶ 7].

26 **4. The Experience and Views of Counsel**

27 Class Counsel are particularly experienced in litigating unlawful recording
 28 claims and have a keen understanding of the legal and factual issues involved in

1 this case. [Kazerounian Decl., ¶ 22; and, Swigart Decl., ¶ 15]. Based upon this
 2 experience, Class Counsel fully endorse this settlement as fair, adequate and
 3 reasonable which weighs heavily in favor of the Court approving the settlement.
 4 *See In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal.
 5 2007) (quoting *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)
 6 (“The recommendations of Plaintiff’s counsel should be given a presumption of
 7 reasonableness.”); *Linney v. Cellular Alaska P’ship*, 1997 U.S. Dist. LEXIS 24300,
 8 at *16 (N.D. Cal. 1997) (“The involvement of experienced class action counsel and
 9 the fact that the settlement agreement was reached in arm’s length negotiations,
 10 after relevant discovery had taken place create a presumption that the agreement is
 11 fair.”).

12 **5. The Presence of a Governmental Participant**

13 No governmental agency is directly involved in this lawsuit; however,
 14 Defendant has notified the officials designated pursuant to the Class Action
 15 Fairness Act, 28 U.S.C. § 1715 of the proposed settlements. [ECF No. 18]. To
 16 date, no governmental entity has raised objections or concerns about the
 17 Settlement.

18 **6. The Reaction of Class Members**

19 To date, the Class Members have nearly uniformly approved of the settlement
 20 with no objections or and one exclusion requested. [Kazerounian Decl., ¶¶ 18-19].

21 **7. The Presence of Good Faith, Absence of Collusion, and the Approval 22 of a Third-Party Mediator Support Final Approval of the Settlement.**

23 In addition to considering the above factors, the Ninth Circuit has indicated
 24 that the Court should carefully review the settlement for any signs of collusion or
 25 conflicts of interest. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d
 26 935, 946 (9th Cir. 2011). *Milliron v. T-Mobile USA, Inc.*, 2009 WL 3345762, at *5
 27 (D.N.J. Sept. 14, 2009) (approving a settlement after a one-day mediation before a
 28 retired federal judge and noting that “the participation of an independent mediator
 in settlement negotiation virtually insures that the negotiations were conducted at

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arm's length and without collusion between the parties (emphasis added)"); *Sandoval v. Tharaldson Emp. Mgmt., Inc.*, 2010 WL 2486346, at *6 (C.D. Cal. June 15, 2010) (approving settlement after a one-day mediation and noting that "the assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive (emphasis added)"; *Larson v. Sprint Nextel Corp.*, 2010 WL 239934, at *11 (D.N.J. Jan. 15, 2010) (same); *Bert v. AK Steel Corp.*, 2008 WL 4693747, at *2 (S.D. Ohio Oct. 23, 2008); 2 McLaughlin on Class Actions § 6:7 (8th ed) ("A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion (emphasis added)."); and, *Dennis v. Kellogg Co.*, 2010 WL 4285011, at *4 (S.D. Cal. Oct. 14, 2010) (the parties engaged in a "full-day mediation session," thus establishing that the proposed settlement was noncollusive (emphasis added).").

As detailed above, the Settlement is the result of lengthy, adversarial arm's-length negotiations between attorneys experienced in the litigation, certification, trial and settlement of nationwide class action cases. In addition, the Honorable Edward A. Infante (Ret.) of JAMS facilitated the final settlement of this action. [Kazerounian Decl., ¶ 8; and, Swigart Decl., ¶ 8]. Accordingly, no signs of collusion or conflicts of interest are present here.

IV. CONCLUSION

For all of the foregoing reasons, the Parties respectfully request this Court enter an Order granting final approval of the Settlement.

Dated: October 14, 2014

Respectfully submitted,

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